FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

NO. 235

MISSOURI PACIFIC RAILROAD COMPANY, *Petitioner*,

v.

J. A. MOORE and FARRIS ANTOINE, *Respondents*

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Fifth Circuit

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To the United States Court of Appeals For the Fifth Circuit

Petitioner, Missouri Pacific Railroad Company, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled and numbered cause on March 20, 1959.

Citations To Opinion Below

The opinion of the Court of Appeals (R. 448), printed in Appendix "A" hereto, page 33, is not officially reported but is printed in 264 Federal Reporter, 2nd Series, at page 754. The Court of Appeals did not write an opinion denying Petitioner's Petition for Rehearing.

Jurisdiction

The judgment of the Court of Appeals was entered on March 20, 1959 (R. 455). A timely Petition for Rehearing, filed on April 10, 1959, was denied June 5, 1959. Jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254.

Questions Presented

Are the fact findings, made by a board duly constituted in accordance with a labor contract in effect between a common carrier and two of the unions representing its employees, at a hearing as provided in said contracts, which findings are supported by substantial competent testimony, subject to review by a jury de novo?

Is a common carrier liable in damages in a wrongful discharge suit where the discharges followed fact findings by a duly constituted board, which findings constituted good cause, under a labor contract which provided for discharge for just cause, where the fact findings are fully supported by the evidence presented at the hearing, which was fairly conducted, and at which the rights of the employees under the labor contract were fully protected and at which there was no evidence of bias or preconceived opinions on the part of the members of the board?

Statutes Involved

The Statutory Provision involved is 49 U.S.C. Sec. 1, Para. 7. Such is printed as Appendix "B" Page 41 of this Petition.

Statement

The factual situation out of which this controversy arose is a simple one. Prior to November 18, 1954, the then General Manager of Petitioner received certain information to the effect that cash fare tickets were being mishandled on the passenger run of Petitioner's train from Houston, Texas, to New Orleans, Louisiana and return. He therefore instructed Special Agent Rogers to make an investigation of this matter and ascertain the true facts (R. 202-203). Special Agent Rogers then went to the Harris County Sheriff's Office in Houston, Texas, and requested Captain Nichols of that department to secure or recommend to him two reliable colored investigators. (R. 204). Captain Nichols contacted two such men that had done work for the Harris County Sheriff's Office on prior occasions, and who had been found by that department to be reliable, (R. 196) and recommended these two men to Agent Rogers. Special Agent Rogers then employed these two men and instructed them to ride Train No. 10 from Houston to New Orleans on Nov. 26, 1954. His instructions to the men were to ride the train anyway they could; if they could ride without tickets, fine, but if they had to buy tickets, to buy the tickets (R. 205). He was at the station when such train departed and the two men were on it (R. 206). The two investigators returned from New Orleans to Houston on November 30, 1954 on Petitioner's passenger train. When they returned to Houston they went directly to the Harris County Sheriff's Office and made a joint statement in the form of a letter addressed to the then General Manager of Petitioner. A copy of such statement appears at page 355 of the record.

A copy of the investigators' report was furnished to Mr. V. A. Gordon then Assistant General Manager of Petitioner, whose office was in Houston, and upon receipt of such he ordered a hearing to ascertain the facts with reference to whether or not the respondents were guilty of the matters set out in the report of the investigators. The hearing was actually conducted by Mr. R. H. Dollar. The hearing was held after due notice was given to each of the respondents herein, in accordance with the contract between Petitioner and Respondents' respective unions, and each of Respondents was present at the hearing and represented by a representative of their choice. (R. 366 and R. 369)

Based upon the testimony introduced at such hearing, the following findings were made:

> "Investigation developed that Conductor J. A. Moore was in charge of train No. 9, New Orleans to Houston November 29, 1954 and that Brakeman Farris Antoine was working as porter on train No. 9, New Orleans to Houston November 29, 1954. Testimony of Nicholas Mann and George Norton indicates that they approached Porter Farris Antoine at Union Station, New Orleans, La. and made arrangements with Porter Antoine to ride train No. 9 for the sum of eight dollars ($8.00) apiece, which these men paid Porter Antoine. Nicholas Mann and George Norton asked Porter Antoine if they did not need a ticket and he told them "No". Investigation further developed that Conductor Moore permitted these two men to ride his train from New Orleans to Houston without any other transportation, and when Conductor Moore and Porter Antoine came through the coach taking up tickets the porter proceeded ahead of the conductor and pointed to Mann and Norton, the con-

ductor put two seat tickets over the windows, and asked no further questions. He did not receive any form of ticket from either Mann or Norton." [R. 346-347]

In accordance with the findings made at such hearing each of the Respondents was dismissed from service for violation of Rule N of Petitioner's Book of Rules (R. 341), which reads as follows:

"N. Courteous deportment is required of all employes in their dealings with the public, their subordinates and each other.

"Employes who are careless of the safety of themselves and others, negligent, insubordinate, dishonest, immoral, quarrelsome or otherwise vicious, or who do not conduct themselves in such a manner and handle their personal obligations in such a way that their railroad will not be subject to criticism or loss of good will, will not be retained in the service.

"Employes must not enter into altercations, play practical jokes, scuffle or wrestle on company property.

"They must show on time-slips, time-books or payroll required information as to work actually performed."

The pertinent portion of the conductor's contract (Respondent Moore) with Petitioner reads as follows:

"ARTICLE 43.

"Section A. — Discipline and Grievance: No conductor will be disciplined or suspended, or unfavorable entries made against his record, without just and sufficient cause. In case a conductor is taken out of serv-

ice, he will be given a hearing and shall be permitted to select any two employed conductors to be present at examination of all witnesses testifying, and shall have the right to question all witnesses and a decision shall be rendered in wrting in his case, within five (5) days.

"Section C.—When a conductor is brought to trial for any offense, the charge shall be made within five days and be specified, and he and his representatives shall have the right to produce witnesses to testify in his defense at such investigation and to examine all papers and to question all persons giving evidence in his case.

"Section D—A conductor who feels that he has been unjustly dealt with shall have the right to appeal to his superior officers within ten days, in person or through a representative composed of employees representing the organization, together with the local or general Chairman or both. If found not guilty, the conductor shall be reinstated and paid for all time lost. The accused conductor, committee and witnesses covered by the above sections will be given transportation to and from their places of residence, so far as the law allows. All appeals must be made within a period of ten days from date of decision appealed from."

The pertinent portion of the Brakemen's contract (Respondent Antoine) with Petitioner reads as follows:

"ARTICLE 12

Discipline and Grievances

"(a) Brakemen disciplined for violation of rules or unbecoming conduct, will be given a fair and impartial hearing within five days if possible. In case a Brakeman feels that he has been unjustly disciplined or dealt with, he will take the matter up with his Chairman of

Grievance Committee, who will handle with Superintendent by letter, stating nature of grievance and request for hearing. Hearing will be given as promptly as possible, after receipt of request, and decision rendered within five days. In case decision is not given to grievance within five days, he will have the right to appeal to the next higher in authority.

"(d) A Brakeman dismissed from the service must file his case for handling in the proper manner within ninety days or same will not be considered."

The testimony presented at the hearing was as follows:

Mr. J. W. Marshall testified that he was train master, at Houston, Texas, and that Mr. J. A. Moore (one of respondents) was working as conductor in charge of train No. 9 out of New Orleans, Louisiana, November 29, 1954, arriving at Houston, Texas on the morning of November 30, 1954, and that Farris Antoine (the other respondent) was working as train porter on such train. Mr. Marshall further testified that the reports filed by Conductor Moore concerning such trip showed that he collected a fare of $2.59 covering a trip from Opelousas to Houston and that a total of $2.10 was collected from the sale of pillows. Mr. Marshall further testified that the coach fare from New Orleans, Louisiana to Houston, Texas, was $11.52, including federal tax.

Mr. S. A. Rogers testified that he was a special agent for the Petitioner and he further testified that he had employed two special investigators, George Norton and Nicholas Mann, which he had secured from the Sheriff's office in Houston, Texas. Mr. Rogers further testified that these two men got off of Train No. 9, the one on which Respondent Moore was Conductor and Respond-

ent Antoine was train porter, in Houston, Texas, on the morning of November 30.

George Norton, one of the Special Investigators, testified that he was employed as a special investigator by Petitioner to ride the trains from Houston to New Orleans and return to see if there was any improper handling of tickets and receipts; that he was told to ride Train No. 10 to New Orleans from Houston, and Train No. 9 from New Orleans to Houston; that he did so; that Nicholas Mann was with him on such occasion (R. 354). He further testified that the facts set out in his letter to Mr. E. C. Sheffield of November 30, 1954, were true and correct (R. 356).

Such letter, in substance, was that Mann and Norton (the two investigators) went to Union Station (Houston, Texas) about 7 o'clock on November 26, 1954 and there contacted Redcap No. 11 and requested him to help them get to New Orleans as they were running short on cash. The redcap advised them to have a seat just outside the men's restroom until he could make his contact; however, the redcap failed to return. Mann then boarded Train No. 10 going to New Orleans from Houston and contacted the porter who told him that his name was Frank. At such time he told the porter that he didn't have a ticket and the porter told him that he, the porter, could fix him up. Mann at that time gave the porter $8 and rode the train on into New Orleans without any further questions. The other investigator, Norton, had purchased a ticket at Union Station and rode from Houston to New Orleans on a regular ticket on this trip.

On the way to New Orleans Mann talked to the porter about making connections with reference to coming back

to Houston. The porter advised him to contact a porter named "Slick", who would be on the train leaving New Orleans at 10:10 P. M., Train No. 9. Mann contacted such porter and advised him that Frank told him, Mann, that he, Slick would take care of Mann and Norton. After questioning Mann with reference to a description of Frank, Slick told Mann that it would cost them $8.00 each, and upon Mann paying him such sum, Mann and Norton went inside the car and sat down. Later as the porter passed by, Mann asked him if he needed a ticket and the porter replied, "No, take it easy." Afterwards when the conductor and porter came through picking up tickets, the porter, Slick, proceeded ahead of the conductor and pointed to Mann and Norton and the conductor then put two seat tickets up over the windows and asked no further questions. Mann and Norton rode on to Houston without any further contact or difficulty.

Norton further identified Slick as being Farris Antoine, one of the respondents herein. He further testified that he did not know either of the respondents and had never seen them prior to the occasion in question.

The testimony of Nicholas Mann, the other special investigator, was substantially the same as that given by George Norton and we will not detail it herein. Suffice to say that he also stated that the facts stated in the letter referred to above were true and that he pointed out Respondent Moore as being the conductor on the train from New Orleans to Houston, and Respondent Antoine as being the porter on that train. That he gave Porter Antoine the $16, $8 for Mann and $8 for himself, in New Orleans for transportation to Houston (R. 355-6 and R. 361).

It was further brought out in the hearing that each of the special investigators had a police record; however, it was further developed that special agent Rogers, at the time he employed these two men had no knowledge or information to the effect that either of them had a police record.

Respondent Moore, the conductor, testified at the hearing that he had received proper notice and was ready to proceed with the investigation and that he had a representative that he desired to remain present. He further admitted that he was Conductor on Train 9 out of New Orleans, November 29th, which arrived at Houston November 30, 1954. He denied having any knowledge of anything irregular on the trip. He denied that the facts stated by Norton and Mann with reference to the return trip from New Orleans to Houston were correct and stated that if these two men were on his train they had proper transportation. He further stated that he did not recall seeing either Norton or Mann riding any train of which he had been in charge. He further admitted that if the two men were revenue passengers on his train it was his duty to collect the proper transportation.

Respondent Antoine, the porter, testified at the hearing that he had had proper notice and was ready to proceed with the investigation and that he desired a representative to be present, that a representative was present and remained present. He further testified that he had no witnesses other than those present that he desired to give testimony and that he was porter on Train No. 9 out of New Orleans to Houston on November 29, 1954. He denied that he had any conversation with either George Norton or Nicholas Mann and denied taking any money

from either of them. He further stated that he could not recall either Norton or Mann being passengers on his train on that date.

At the conclusion of the testimony given at the hearing, Mr. Dollar, who was conducting the investigation, asked all present if they had had an opportunity to make a full and complete statement of the facts as known by them, which was answered "yes". He then asked everyone if they had any other witnesses which they desired to testify. The answer was "no". He further asked if each had had the opportunity to ask all questions which they desired to ask of any witness, and the reply was "yes". (R. 374-375)

At the trial of the case testimony with reference to whether or not Respondents were actually guilty of the charges preferred against them was substantially the same as that recited above, which was brought out at the hearing. The two investigators, Mann and Norton, testified substantially as noted above, and the Respondents, Moore and Antoine, once again denied that they were guilty of any misconduct. In addition to these witnesses, there were at the trial of the case as witnesses, Mr. V. A. Gordon, who was then General Manager of Petitioner, and Mr. R. H. Dollar, who was then Assistant Superintendent at Houston. These men, together with Mr. A. F. Judd, who was then Supt. for Petitioner at Kingsville, Texas, constituted the board which passed upon this matter. Mr. Judd did not testify due to his ill health. Both Mr. Dollar and Mr. Gordon testified that they believed the Respondents to be guilty of the charges made against them by virtue of the testimony which they heard at

the hearing. Such testimony is, of course, noted above. Each of them further testified that they had no pre-conceived notions regarding the guilt or innocence of the parties, neither of them personally knew either of the Respondents and that neither of them knew the investigation was being carried out until it was actually conducted and the investigators had made their report to Mr. E. C. Sheffield, then General Manager.

At the trial of the case the Respondents presented no other or further evidence or testimony which would prove or tend to prove their innocence of the charges made against them.

The Trial Court instructed the jury with reference to the liability issue as follows (R. 378-380):

> "Now contrary to what you may have thought, the ultimate issue which you gentlemen must decide here is (not) whether Mr. Moore and Farris Antoine in fact were guilty of the misconduct which the railroad charged them with back in 1954. The question which you gentlemen must decide is whether, as to Antoine, he was unjustly dealt with; whether as to Mr. Moore, there was just and sufficient cause for the railroad officials to take the action which they did in his case. What that means is this: Of course, if we should determine here today, in 1958, that in fact these men were guilty of taking this money improperly, on the part of Antoine, and permitting the passengers to ride without a fare or without a ticket, by Mr. Moore, and if we are convinced—you are convinced—that the railroad officials so found, and that they were accurate in their findings, then I think it follows that their action in discharging these men was entirely warranted, and the defendant would be entitled to your verdict.

"On the other hand, if we should determine now, on evidence before you in 1958, that in fact the railroad officials may have been in error and may have reached an erroneous decision in the case, the defendant still would be entitled to your verdict if the railroad officials, in reaching that decision, acted honestly, acted in good faith, and acted upon sufficient evidence before them so that you might reasonably believe that men in their position might honestly and in good conscience reach a determination that probably Mr. Moore and Antoine were guilty of the offenses with which they were charged.

"Hence, if there was before the railroad officials at the hearing in March of 1955, a state of facts as would lead men of ordinary caution and prudence placed as were the railroad officials to believe and conscientiously to entertain a strong suspicion of the guilt of the two men here involved, then I charge you that their action in discharging the plaintiffs here would have been justified, and would have been warranted. If they were acting honestly and in good faith, and with sufficient evidence before them so that they might reasonably reach that conclusion, they would be protected, even though it might now appear, three years later, that their judgment at that time was wrong.

"On the other hand, if you should determine, as I understand the plaintiffs here contend, that the railroad officials, in taking the action which they did, acted arbitrarily, acted capriciously, acted without any good and sufficient cause to believe that these men were guilty of the charges against them. If the railroad officials were motivated by some personal feeling against these two men; if they set out deliberately to get them discharged, without good cause; if you should so find from a preponderance of the evidence, then the plaintiffs would be entitled to your verdict.

"Now, the evidence before you weighing on those issues has been discussed fully by counsel. There is very little that I care to say to you in that connection. It is the plaintiffs' theory as I have suggested, that these two investgators who were employed were not worthy of belief; that the railroad officials were motivated by some improper prejudice against the two plaintiffs here, and in their own mind convicted them before they ever had the investigation made, or before the hearing was ever held. It is the theory of the defendant, on the other hand, as I understand it, that they had reason to believe that something improper of the sort which we have heard discussed was going on, and that they went to the sheriff's office to find two individuals who might make such an investigation for them; that they employed these two men, without any notice of any improper background that they might have had; and of course you have heard all of the testimony as to what the investigators told you they found."

We quote further from the Court's charge, when he was giving the jury further instructions, after the jury had asked a question (R. 388-389):

"Well, I will make this statement to you: The ultimate matter for you gentlemen to decide—and this is substantially what I told you this morning, although perhaps not exactly in the same words—is not whether Mr. Moore and Antoine in fact were guilty or not guilty of the charges. The question for you all to decide is whether, in reaching the decision to discharge these men, which the railroad officials did reach, they acted in good faith, in an honest effort to arrive at the true facts, as the railroad contends, or whether, as the plaintiffs contend, they acted arbitrarily, capriciously, or maliciously, or with some wrongful purpose, unjustly and unfairly to discharge these people from the service.

"If it now appears, three years later, that the men in fact were not guilty, but if the railroad officials had before them at the time they took the actions which they took sufficient evidence so that it may be said they acted in good faith, looking at the situation from their position as railroad officials, bearing in mind their duties and obligations as such, it might be said that they were acting reasonably, honestly and in good faith, then the defendant is entitled to your verdict."

The jury returned general verdicts in favor of the respective Respondents and the Petitioner then filed a motion for judgment non obstante veredicto (R. 398 and 402). Thereafter written briefs were submitted to the Trial Court and after considering same the Trial Court handed down a memorandum opinion (R. 406). The opinion is printed as Appendix "C" to this Petition, P. 44, and we quote one short portion of it at this point, as follows:

"There was no evidence of probative value showing or tending to show that the railroad officials acted arbitrarily or capriciously in finding the plaintiffs were guilty of the matters charged, or that they were influenced by improper motives. There was considerable evidence tending to show the plaintiffs' guilt in the record of the hearing. The plaintiffs simply denied the charge, and denied ever having seen the special investigators.

"The plaintiffs failed to sustain the burden to show that the action of the defendant was "without just and sufficient cause", or that the plaintiffs had been "dealt with unjustly". (See *Buster v. Chicago, M., St. P. & P. R. Co.* (7th Cir.), 195 F. (2d) 73.)"

The Court of Appeals disapproved the instruction quoted above, stating (R. 449):

> "In this charge, instead, under Texas law (Texas & N.O. R.R. Co. v. McCombs, 143 Tex. 250, 183 S.W. 2d 716; Thompson v. Moore, 222 F. 2d 91; 29 Tex. Jur., "Master and Servant", Sec. 1314 and 1317, pp. 28, 29, 30 and 33), indeed under general common law, 35 Am. Jur. Secs. 36 and 40, pages 470 and 473, of charging the jury, as the law of the cases on trial, that under the contracts sued on the railroad company would be liable for damages if it discharged the plaintiffs wrongfully, that is without good cause or reason, and that the burden was on it to prove that the discharges were for good reason or cause, the district judge, apparently laboring under the mistaken idea that the suits, instead of being common law suits for wrongful discharge, constituted appeals to the district court from the findings and actions of administrative boards, instructed the jury that the question of the rightfulness or wrongfulness of the discharge was not in issue but merely whether the action taken by the company was arbitrary, that is not taken in good faith."

Respondents alleged (R. P. 6 and 14) that the suits arose under the laws of the United States, 45 U.S.C., Chap. 8, Sec. 151, et seq., and also that diversity of citizenship existed. Subsequently in pre-trial stipulations (R. 29 and 32), Respondents waived any relief sought under such statute and therefore jurisdiction of the District Court was based upon Diversity of Citizenship.

Reasons For Granting The Writ

The theory set forth by the Court of Appeals in this cause is erroneous; it is directly contra to the holding of

the Court of Appeals for the 7th Circuit in the case of *Buster v. Chicago, M & St. P. & P.R.* (1952) 195 F. 2d 73; it is contra to a prior holding of the 5th Circuit in the case of *Thompson v. Moore*, (1956) 223 F. 2d 91; it does not correctly declare the Texas Law on this point, *Matlock v. G.C. & S.F. Railroad Co.*, 99 S.W. 2d 1056, writ dism.; it seriously hinders the enforcement of a Federal Statute, Sec. 1 par. 7 of Title 49 U.S.C.

The issue before this Honorable Court is the same as the one before the Court of Appeals in the case of *Buster v. Chicago, M & St. P & P.R.*[1] Petitioner firmly believes that the opinion in that case is correct and should be followed in this case. We quote from such opinion as follows:[2]

> " * * * The sole question involved on this appeal is whether or not the plaintiff was given a fair and impartial hearing in the charge that he had violated company rules. The trial court found that he was. In his opinion, unreported elsewhere, the trial judge said:
>
> " 'The Court is of the opinion that the verdict rendered is contrary to the overwhelming preponderance of the evidence in the case.
>
> " '* * * Certainly, on its face, the rule is a reasonable one for the proper and efficient operation of the defendant railroad. The only question to be considered, therefore, is whether or not the rule was properly administered by the defendant, through its agents, in the instant case. A careful comparison of the transcript of the company hearing and the evidence adduced in the court trial reveals them to be essentially

[1] 17th Cir., 1952, 195 F2d 73.

[2] 195 F2d 73, 75.

and substantively identical. In other words, qualitatively the plaintiff offered little or nothing more here to sustain his position than he had during the previous private hearing. In view of such fact, it appears clear that the jury substituted its judgment for that of the company officials rather than devoting itself, as instructed by the Court, entirely to a consideration of whether the defendant granted plaintiff a fair hearing and, in fairness and justice, could have arrived at the result actually attained, namely, dismissal of plaintiff on the ground that he was guilty of a violation of Rule 702. * * *'

"* * * We agree with the trial court that there is no substantial evidence in this record which would justify a finding that plaintiff did not have a fair and impartial hearing in September, 1947, on the charge that he had violated company rules.* * * "

In fact, the Court of Appeals that decided the instant case had in a previous case, *Moore v. Thompson*,[3] expressly approved a jury charge which embodied the same identical concepts which it disapproved in this case. In each case the controversy arose in the State of Texas and jurisdiction of the Federal Court was based on diversity of citizenship. We quote from the opinion of the court in the *Moore v. Thompson* case as follows:[4]

" * * * In Texas & New Orleans R. Co. v. McCombs, 143 Tex. 257, 183 S.W. 2d 716, apparently changing the Texas rule in railway employee cases, the Supreme Court of Texas decided that Moore v. Illinois Central R. Co., 312 U.S. 630, 61 S. Ct. 754, 85 L. Ed. 1089,

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[3] 223 F2d 91, 1956

[4] 223 F2d 91, 92

announced the local law to be applied in similar cases. The McCombs decision was prior to Transcontinental & Western Air, Inv. v. Koppal, 345, U.S. 653, 73 S. Ct. 906, 97 L. Ed. 1325, in which the court held that, if the applicable state law requires an employee to exhaust his administrative remedies under his employment contract before filing suit, he must show that he has done so. Nevertheless, regardless of the reason for the McCombs decision, it remains the local law, announced by the highest court in the state. On the authority of this decision, the court below overruled the defendant's second motion to dismiss the complaint, and let the action stand for trial on the following issues:

(1) Was the plaintiff physically able to perform his duties at the time he sought to return to work:? (2) did the defendant arbitrarily refuse to permit him to return to work? and (3) the amount of damages that he was entitled to recover. * * * "

" * * * The jury by its verdict, having found that appellee was physically able to perform the duties of his employment as conductor for the defendant on May 29, 1952, *and that appellant arbitrarily refused to return him to work on said date, and such verdict being supported by substantial evidence*, the court correctly rendered judgment upon said verdict, awarding plaintiff damages for wrongful discharge. The trial court also correctly overruled defendant's motion for an instructed verdict. * * * ". (Emphasis ours)

To further illustrate the Texas Law on this point we call attention to the case of *Matlock v. G.C. & S.F. Railroad Company*.[5] This was also a suit for wrongful discharge.

[5] 300 S.W. 2d 1056

The employee had been charged with inattention to duty and insubordination. A hearing was held, as in the instant case, in accordance with the labor contract involved and the employee was discharged. We quote from the opinion of the court as follows:

> "From the foregoing it is clear that Matlock was not only bound by the rules and regulations governing his craft and issued under their contract with the Railway Company, but that he recognized this fact and undertook to comply with them. The findings of the committee before which he appeared in person and by the duly selected representative of his craft, not having been set aside by an appeal which he was authorized to make to the joint appeals board provided for in the contract with the Railway Company, was binding upon him and constituted good cause for his discharge by the appellee. If good cause existed for his discharge, and the committee's findings constituted good cause (see 29 Tex. Jr. P. 30, and the cases there cited), he had no cause of action against the appellee, even if he had a lifetime employment contract.
>
> "Under these circumstances we think the trial court properly instructed a verdict in favor of appellee, and the errors, if such they be, complained of by appellant, became immaterial."

The cases cited Supra fully support the trial court's charge to the jury in this cause. The charge appears in the record. However, for the court's convenience, we quote again one excerpt, which fairly presents the charge insofar as the issue of liability is concerned, as follows:

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[1] 290 S.W. 2d 1056, 1058

[2] R. 375-R 388

[3] R. 388-389

"Well, I will make this statement to you: The ultimate matter for you gentlemen to decide—and this is substantially what I told you this morning, although perhaps not exactly in the same words—is not whether Mr. Moore and Antoine in fact were guilty or not guilty of the charges. The question for you all to decide is whether, in reaching the decision to discharge these men, which the railroad officials did reach, they acted in good faith, in an honest effort to arrive at the true facts, as the railroad contends, or whether, as the plaintiffs contend, they acted arbitrarily, capriciously, or maliciously, or with some wrongful purpose, unjustly and unfairly to discharge these people from the service.

"If it now appears, three years later, that the men in fact were not guilty, but if the railroad offifficials had before them at the time they took the actions which they took sufficient evidence so that it may be said they acted in good faith, looking at the situation from their position as railroad offifficials, bearing in mind their duties and obligations as such, it might be said that they were acting reasonably, honestly and in good faith, then the defendant is entitled to your verdict."

The Court of Appeals, citing as its authority *T & N O RR. Co. v. McCombs*[9] and *Thompson v. Moore*,[10] expressly disapproved the above instruction, stating:

"We are in no doubt that the cases were wrongly submitted to the jury; that, since the suits were, under Texas Law, common law suits for damages for discharge, the issue was simply whether the discharges were wrongful. * * * "[11]

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[9]113 Tex. 256, 183 S.W. 2d 716.

[10]Supra, note 5.

[11]Opinion P. 6 R. 453.

In so holding the court misread the Texas cases cited in its opinion. The *T. S. N. O. v. McCombs* case does not deal in any manner with the issue at hand. That case dealt solely with whether the plaintiff could maintain his suit as against a plea in abatement that he had not exhausted his administrative remedies. The Texas Supreme Court did not reach the merits of the case and there is no discussion of the criteria to be applied in case of alleged wrongful discharge. We must respectfully insist that the Court of Appeals in the instant case misread that case.

The other case relied upon by the Court of Appeals, *Moore v. Thompson*, tends, as we read the case, to support Petitioner. In that case, as in this case, the labor contract provided that there could be a discharge only for good cause. The employee had been injured and he contended that he was able to return to work but the carrier declined to permit him to do so. The trial court submitted the case to the jury on special issues which inquired: (1) whether or not the employee was able to work, (2) did the carrier *arbitrarily* refuse to permit him to work? and (3) the amount of damages. In the instant case the court told the jury that if the carrier arbitrarily and capriciously discharged Respondents the jury should find for Respondents. Thus the essential test used in the *Thompson v. Moore* case was also used in the instant case. We do not perceive why the charge should be approved in the *Thompson v. Moore* case and disapproved in the instant case, where both cases arose in Texas and since there have been no intervening contrary decisions by the Texas Appellate Courts.

Not only is the position of Petitioner supported by the applicable authorities, it is also supported by sound reasoning.

The rule of law applied by the Court of Appeals places an impossible burden upon the carrier. This case is a prime example. What other course could the General Manager of Petitioner have followed upon receipt of information that cash fares were being mishandled. Surely if he did not direct that the matter be investigated he would have been derelict in his duty as an executive. Certainly one of the duties of an executive to the corporation and its shareholders is to keep employees from stealing from it. We submit that the only reasonable action which the General Manager could take was the action he did take.

Following his decision to have the matter investigated, what other course could the General Manager have taken than to direct one of the carrier's special agents to make the investigation? Certainly the General Manager himself could not have taken time out from his regular duties to conduct the investigation. And Agent Rogers, after he had been instructed to conduct the investigation, being a regular employee of the carrier and knowing that some of the crews would probably know him by sight, sought competent investigators from a reliable source. What more logical or appropriate place was there to seek two competent investigators than the local Sheriff's office. Certainly, the Special Agent acted properly when he turned to a local law enforcement agency for such assistance.

After the two colored investigators made the trip and turned in their reports, it was certainly in order for a hearing to be held in accordance with the labor contracts then in effect. The report of the two investigators made serious charges against the two employees which warranted a hearing where the employees and their chosen representatives would have an opportunity to face the

investigators and cross-examine them. Such opportunity was afforded at the hearing.

Finally reviewing the testimony at the hearing, it certainly can not be said that a reasonable person could not reach the conclusion that the Respondents were actually guilty. It is well to bear in mind that the board heard the testimony of Rogers as to how he secured the investigators, the testimony of Captain Nichols, of the Sheriff's office, that he recommended these two investigators to Mr. Rogers because they had done work for the Sheriff's office before and had proved to be reliable, the testimony of the two investigators as to the payment of the money to Respondent Antoine and the riding on Petitioner's passenger train from New Orleans to Houston. Also strongly supporting the testimony of the two investigators was the fact that they knew Respondent Antoine's nickname "Slick", even though they had not known Antoine prior to this occasion, as even Antoine admitted. While of course it is true that Respondents denied any wrong doing, they called no witnesses and the Board could consider the fact that Respondents were vitally interested in the outcome while the two investigators were disinterested parties. The interest of a witness in the outcome of any matter is always a factor to be weighed.

Bearing all these factors in mind there can be no dispute but that there was ample evidence presented at the hearing to convince a reasonable man that Respondents were actually guilty of the charges made against them. It necessarily follows that there is ample evidence to support such finding. Mr. Gordon and Mr. Dollar, two of the members of the board which heard this matter testified at the trial and each testified that he was of the opinion,

after hearing the evidence presented at the hearing, that each of Respondents was actually guilty of the charges preferred against him, but that prior to the hearing, each of them (Gordon and Dollar) had an open mind regarding the question of the guilt of Respondents. There is no evidence in the record tending to cast any doubt on this testimony, and there is, of course, strongly supporting this testimony of Messrs. Gordon and Dollar, the salient fact that neither of these men were aware that the investigation was being conducted until it was completed and they were furnished a copy of the investigators' report, at which time they ordered the hearing to be held.

We come now to the crucial question. The Board having heard the testimony was of the opinion that the two employees were guilty of the charges. The charges are serious ones. If permitted or condoned by the carrier they would probably subject the carrier to a fine under Para. (7) Sec. 1, 49 U.S.C. They constitute good cause for discharge. Even Respondents admitted that the charges made, if true, constituted dishonesty (R. 141 and 181). The crucial question is simply, what should the Board recommend as discipline? Certainly no one wants an employee stealing from him. These two men were caught red-handed. Certainly the members of the Board being executives of the Petitioner, owe a duty to their superiors, the Board of Directors and the shareholders. That duty certainly requires that these men be discharged since the Board is convinced of their guilt. The least that can be said of them is that they are undesirable employees for positions of trust.

Must the executives by faithfully fulfilling their duties to the company and its stockholders subject the carrier to a suit for damages for wrongful discharge? Must the

executives go further and actually foretell whether a jury in such event will view the evidence the same as they did and be convinced that the employees were actually guilty? To place this burden upon the officers of the carrier is, as this court knows, to demand the impossible. No one can foresee what result a jury will reach. Different juries often reach different conclusions on identical state of facts. Our system of Jurisprudence can not, and does not, guarantee the correct result each time. It can only guarantee a fair hearing and that the results are supported by substantial evdence. Even in criminal cases, our system does not guarantee that the r it result is reached each and every time.

Why then, we may ask, is this intolerable burden placed upon the carrier. Before discharging an employee, it must be able to correctly foretell that a jury is going to reach the same conclusion that its Board reached. In order to do so it must have foreseeability much greater than that possessed by a reasonable man.

This isn't a matter of fastening liability on the company due to negligence or because it has set out to discharge the men regardless of the facts. This is a matter of holding the company liable even though the men had a fair hearing and even though the management was convinced of the men's guilt and even though there was competent, substantial evidence to support the findings of the Board. The holding of the Court of Appeals is simply that the carrier is liable because its management could not accurately forecast the verdict of the jury. To place liability on such basis is, we submit, to pave the way to gross injustice.

The Rule involved herein, quoted supra, is certainly a reasonable one for the efficient operation of the railroad.

Management should be allowed to enforce it without its action being subject to review by a jury, except to the extent that the hearing provided for in the contract is a fair one conducted in accordance with the labor contract, that the findings made at the hearing are supported by substantial competent evidence and are not merely arbitrary and capricious ones. The holdings of the Court of Appeals leaves no room for management to manage. Faced with this situation management is gored by the horns of a dilemma. It is subject to severe criticism if it retains two employees guilty of violating the Rule in question. Yet if it discharges the men it subjects the company to the whim of a jury, which is not charged with the responsibility of running a railroad, in reviewing its findings. In brief: its damned if it does and its damned if it doesn't.

Petitioner respectfully submits that the foregoing amply demonstrate that the reasoning applied in the cases of *Buster v. Chicago M. & St. P.R.*, *Matlock v. G.C. & S.F.* and *Moore v. Thompson*, Supra, is the correct and just reasoning to be applied to cases of this character. We respectfully submit that the theory and reasoning applied by the Court of Appeals in the instant case leads to an intolerable and unbearable situation, which will unduly hamper and interfere with the efficient and economical operation of common carriers through the states. The reasoning applied by the court in the instant case will permit a jury, not trained in the operation of a railroad and not charged with the responsibility of effeient and economical operation of a railroad, to review the decisions of the management of the roads which are supported by substantial competent evidence, reached after a fair hearing, as provided in the labor contracts with the various unions,

and a review of the evidence presented at such hearing. Such holding by the Court of Appeals also makes useless the provisions in the labor contracts between the company and the respective unions regarding the rights of an employee to have a hearing within a stated time, at which he and a representative of his choice will be entitled to confront and cross examine witnesses who give testimony against him. If a jury is entitled to review the findings made at such hearing and arrive at a different conclusion, it renders useless the holding of the hearing in the first place. Certainly when the contracts were written, the management and the union thought that a provision requiring such hearing, at which the rights of the employee would be fully protected, would tend to enable management and labor to get along better and reduce friction. Certainly it was intended by the parties that such hearing would have some purpose and that it would be a device whereby the rights of all parties could be fully protected. The holding of the Court of Appeals in the instant case destroys such concept in its entirety. As we read the opinion of the Court of Appeals, the findings at the hearing are no concern whatsoever. Even if, in the instant case, the Board had made findings to the effect that the Respondents were not guilty of the charges perferred against them, and after such findings were made, the management had discharged the men regardless, the Petitioner would have been free to defend the case before the jury on the ground that the Respondents were actually guilty, and if the jury had found such, the Respondents would not have been entitled to any recovery. Such holding, of course, takes away a valuable right from the Respondents as well as from the Petitioner, and constitutes a rewriting of the respective labor contracts in effect at the time in question.

The reasoning applied by the Court of Appeals in the *Buster* case, Supra, by the Texas Court of Civil Appeals in the *Matlock* case, Supra, and by this Court of Appeals in the *Moore v. Thompson* case, Supra, does not rewrite the contracts but in effect give full effect to the provisions of the contract. These cases consistently hold that where a labor contract in effect provides that an employee can be discharged only for cause, if a duly constituted committee makes fact findings that such cause exists, the employee is bound by such findings unless they are set aside upon appeal, as set out in the contract, or unless the hearing at which the findings are made is not a fair one, or the findings made by the committee are not supported by substantial, competent evidence presented to the committee. Of course, the same exact factual situation was not present in the *Moore v. Thompson* Case, but the same criteria was applied, namely, was the action of the defendant in refusing to permit the plaintiff to return to work arbitrary. That is the very identical rule which the Petitioner is contending for in this case. We respectfully submit that the well reasoned authorities cited herein fully support the petitioner and that the cases cited by the Court of Appeals in its opinion wholly fail, on a close reading, to support the proposition for which the Court of Appeals cited them.

This Court may be questioning as to why it should hear this matter, since technically speaking it is only a question of Texas Law and the jurisdiction of the District Court was based upon diversity of citizenship. We respectfully submit that the principles involved herein and the ramifications of the opinion and holding of the Court of Appeals are of sufficient importance to the jurisprudence of the country to warrant this Honorable Court's considering the matter. Two Courts of Appeals have reached diametrically

opposite results. This in itself is bound to create confusion among the various Courts of Appeal as well as among the various state courts, as it is well known that the opinions of the various Courts of Appeal carry considerable weight with the appellate courts of the various states. Also, this matter is of vital concern to the common carriers of the entire country, as this is of course a problem which the management of all carriers must face. The situation should be rectified on this occasion in order that the management of the carriers, and the various governing officers of the various railroad labor unions will know exactly where they stand with reference to this point. In addition thereto this matter is of some relevance to the enforcement of Section 1, Para. 7, 49 U.S.C. This Section prohibits common carriers from carrying passengers without collecting the proper fare, with certain exceptions which are not material at this point. It is probable that the condoning of this type of conduct on the part of its employees would subject the carriers to the penalties set out in said Section. Certainly a carrier, or any other citizen, should not condone the violations of a Federal Act. Yet on the other hand, a carrier, or any other citizen of the country, should not be forced to subject itself to a law suit and to the probabilities of having to pay a substantial sum of money in attempting to stamp out or halt an unlawful act or practice. We therefore respectfully submit to the Court that the principles involved in these causes are of sufficient importance to warrant the time and consideration of this Honorable Court.

Conclusion

Having received information that cash fares were being mishandled on one of its passenger runs, the manage-

ment of Petitioner did the only reasonable thing to be done. It ordered an investigation. In conducting the investigation, Petitioner's agent sought assistance at the local law enforcement agency, which is certainly a logical place if one wants to secure competent help in this situation. The two investigators conducted the investigation and made a report of thir findings to the management. Upon receipt of such report the management ordered a hearing in accordance with the labor contract then in effect and the hearing was held in accordance with that contract, after due notice and after every right of the Respondents was fully protected. From the evidence presented at the hearing, the members of the Board were of the opinion and made fact findings that the Respondents were actually guilty of the charges preferred against them, and which findings are fully supported by substantial, competent evidence presented at the hearing. The findings were that Respondents had violated a rule of Petitioner, which in itself is a reasonable one for the efficient and economical operation of a railroad. For such violation the Respondents were discharged.

The applicable authorities hold without dissent that Respondents are not entitled to recover from Petitioner unless such action on the part of the Petitioner was arbitrary or capricious, or unless the findings are not supported by the evidence presented at the hearing, or unless the hearing was not a fair one. The evidence is undisputed that the hearing was a fair one, conducted in accordance with the labor contract and that the findings made thereat were fully supported. It follows that the action of the Petitioner in discharging Respondents was not arbitrary.

WHEREFORE PREMISES CONSIDERED, Petitioner prays that this Court issue a Writ of Certiorari directed to the Court of Appeals for the Fifth Circuit in order that this Court may review the record and the opinion of such court and finally reverse the judgment entered by the Court of Appeals and render judgment in favor of Petitioner by affirming the judgment entered herein by the District Court, and Petitioner prays for such other and further relief, both general and special, at law and in equity, to which it may show itself entitled.

Respectfully submitted,

HOWARD S. HOOVER
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Attorney for Petitioners

Of Counsel:

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Certificate of Service

Copies of the above and foregoing have been delivered Mr. J. A. Copeland and Messrs. Jacobs, Davis & Schmidt, attorneys for Respondents by depositing same in the U. S. mail, properly addressed to their respective post office address, postage prepaid.

HOWARD S. HOOVER

APPENDIX "A"

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17483

J. A. MOORE and FARRIS ANTOINE,
Appellants,

versus.

MISSOURI PACIFIC RAILROAD COMPANY,
Appellee.

Appeals from the United States District Court for the Southern District of Texas.

March 20, 1959

Before HUTCHESON, Chief Judge, and CAMERON and BROWN, Circuit Judges.

HUTCHESON, Chief Judge: Plaintiffs below, Moore and Antoine, respectively passenger conductor, and trainman and passenger porter, brought separate suits for damages under Texas law for wrongful discharge. The case proceeding to trial before a judge and jury, evidence was taken and, subject to defendant's motion for directed

verdict, the case was sent to the jury on a general charge, to which defendant took no exception and plaintiffs took none except in respect to elements of damage.

In this charge, instead, under Texas law,[1] indeed under general common law, 35 Am. Jur. Secs. 36 and 40, pages 470 and 473, of charging the jury, as the law of the cases on trial, that under the contracts sued on the railroad company would be liable for damages if it discharged the plaintiffs wrongfully, that is without good cause or reason, and that the burden was on it to prove that the discharges were for good reason or cause, the district judge, apparently laboring under the mistaken idea that the suits, instead of being common law suits for wrongful discharge, constituted appeals to the district court from the findings and actions of administrative boards, instructed the jury that the question of the rightfulness or wrongfulness of the discharge was not in issue but merely whether the action taken by the company was arbitrary, that is not taken in good faith. Not only was this incorrect instruction given in the main charge but it was repeated and re-emphasized when, the jury returning to the court for further information, one of the jurors, stating: "It is a question of whether we are to rule on whether the officials of the railroad were acting in good faith, or whether in our opinion they made a mistake.", the district judge charged:

> "The ultimate matter for you gentlemen to decide—and this is substantially what I told you this morning, although perhaps not exactly in the

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1 Texas & N.O. R.R. Co. v. McCombs, 143 Tex. 250, 183 SW(2) 716; Thompson v. Moore, 222 F(2) 91; 29 Tex. Jur., "Master and Servant", Sec. 1311 and 1317, pp. 28, 29, 30 and 33.

same words—*is not whether Mr. Moore and Antoine in fact were guilty or not guilty of the charges. The question for you all to decide is whether, in reaching the decision to discharge these men, which the railroad officials did reach, they acted in good faith, in an honest effort to arrive at the true facts, as the railroad contends, or whether, as the plaintiffs contend, they acted arbitrarily, capriciously and maliciously or with some wrongful purpose, unjustly and unfairly to discharge these people from the service.*

"If it now appears, three years later, that the men in fact were not guilty, but if the railroad officials had before them at the time they took the actions which they took sufficient evidence so that it may be said they acted in good faith, looking at the situation from their position as railroad officials bearing in mind their duties and obligations as such, it might be said that they were acting reasonably, honestly and in good faith, then the defendant is entitled to your verdict." (emphasis supplied)

Later, in reply to another question as to whether the burden of proof was on Mr. Moore to disprove the testimony of the witnesses, the court said:

*"I said the burden of proof is on the plaintiff to prove his side of the case by a preponderance of the evidence. Yes, it is necessary for the plaintiffs, Moore and Antoine, to prove that the railroad officials were acting capriciously, or arbitrarily, or unfairly or dishonestly, and if the evidence in your judgment is evenly balanced, then the defendant is entitled to your verdict. * * *"* (Emphasis supplied)

To these instructions no objection was made or exception taken. Thereafter the jury returned a verdict for plaintiff Moore for damages in the amount of $17,000.00 and for Antoine in the amount of $9000.00, and plaintiffs moved for judgments on the verdicts.

Defendant in due time moving for judgments notwithstanding the verdict, the district judge, filing a memorandum opinion,[2] granted the motion and entered judgments accordingly.

Appealing from the judgments against them, upon a stipulation that the cases should be consolidated for ap-

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[2] "Memorandum:

"This is an action by two former employees of the defendant railroad company, who seek to recover damages for their alleged wrongful discharge. The employment of each plaintiff is under and in pursuance of a collective bargaining agreement between the employees' respective brotherhoods; Conductors as to the plaintiff Moore, and Brakemen as to the plaintiff Antoine. Under the contract with the Conductors, discipline by the railroad might not be administered to the employee 'without just and sufficient cause'. Comparable language in the Brakeman's contract provides that such employees would not be disciplined or dealt with unjustly.

"Sometime prior to the discharge of the two plaintiffs, railroad officials had reason to believe that passengers between Houston and New Orleans were being carried without the payment of fare, and that the railroad employees were accepting money or bribes from such persons, by reason of which they were permitted to ride without the purchase of a ticket. In order to make an investigation of this alleged practice, two individuals were employed as special investigators. They were not prior railroad employes, and hence were not known to the train crews. Such special employees were directed to make the effort to bribe or pay the conductor and/or the porter on the passenger trains between Houston and New Orleans and return, and thus to secure passage without the purchase of ticket.

peal and a single record furnished, plaintiffs are here pointing to the fact that, notwithstanding the incorrect

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"As a result of this investigation, and on the statement of the two investigators that the two plaintiffs here were guilty of this practice and had accepted money for this purpose, charges of improper conduct and violation of company rules were filed against them. A hearing was held in each instance, before a Board of company executives convened for that purpose, as provided in the union contracts. Each plaintiff was advised and represented by one of his union representatives, designated for that purpose. In each instance the Board found the employee to be guilty of the practice mentioned, and ordered the discharge of each from the service.

"At pre-trial conference, it was determined that the only issue of fact was whether the railroad officials in reaching the conclusion that each plaintiff was guilty, and in ordering their discharge, had acted with 'just and sufficient cause' or had 'dealt unjustly' with the plaintiffs.

"In each instance the Jury found for the plaintiffs, fixing damages at $17,000.00 and $9,000.00, respectively.

"At the close of plaintiffs' testimony, and again at the close of the evidence, the defendant moved for a directed verdict. Ruling on each motion was reserved. I am convinced that the motions were well taken and should have been granted.

"There was no evidence of probative value showing or tending to show that the railroad officials acted arbitrarily or capriciously in finding the plaintiffs were guilty of the matters charged, or that they were influenced by improper motives. There was considerable evidence tending to show the plaintiffs' guilt in the record of the hearing. The plaintiffs simply denied the charge, and denied ever having seen the special investigators.

"The plaintiffs failed to sustain the burden to show that the action of the defendant was 'without just and sufficient cause', or that the plaintiffs had been 'dealt with unjustly'. See Buster v. Chicago, M., St. P. & P.R. Co. (7th Cir.) 195 F(2) 73.

"The motion to set aside the verdict and to enter judgment for the defendant notwithstanding the verdict is granted."

submission of issues to the jury and the heavy burden imposed upon them, the jury found for plaintiffs. So pointing, they insist: that there was ample evidence to take the cases to the jury, and, viewed in the light most favorable[a] to the verdict, as it must be, it fully sustains the verdicts for plaintiffs; that the judgments non obstante veredicto were, therefore, wrongly entered; and that they must be here set aside and judgments entered on the verdicts in plaintiffs' favor.

The defendant, urging both that the charge was correct and that, whether it was or not, because of plaintiffs' failure to object to it, it must for the purpose of this appeal be taken as correct, insists: that the verdict was without support in the evidence; and that the judgment was right and must be affirmed. We cannot agree with these views.

On the contrary, we find ourselves in full agreement with all of plaintiffs' contentions except that the judgment must be here rendered by directing a judgment on the verdicts for plaintiffs. We are in no doubt: that the cases were wrongly submitted to the jury; that since the suits were, under Texas law, common law suits for damages for discharge, the issue was simply whether the discharges were wrongful and the burden of maintaining their rightfulness was on the defendant and not on the plaintiff; that there was ample evidence to take the cases to the jury and to support the verdicts in plaintiffs' favor; and that the judgment non obstante veredicto must, there-

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a. Tharp v. Mundy (5 Cir.) 195 F(2) 987; Employers v. LeJeune, 189 F(2) 521; Funk v. Seaboard, 212 F(2) 424; Banks v. Associated (5 Cir.) 161 F(2) 305; Strawn v. Travelers (5 Cir.) 200 F(2) 778; Readnour v. Com. Standard Ins. Co., 253 F(2) 907.

fore, be reversed. Instead, however, of here directing entry of judgments on the verdicts for appellants, we order the judgment reversed and the cause remanded to afford the district judge[1] the opportunity to determine whether judgment should be entered on the verdicts or whether a new trial should be granted.

REVERSED and REMANDED.

CAMERON, Circuit Judge: I concur in the result.

A true copy

Test: EDWARD W. WADSWORTH
Edward W. Wadsworth

Clerk, U. S. Court of Appeals, Fifth Circuit
New Orleans, Louisiana
July 8, 1959

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[1] Roosth v. Genecov, 252 F(2) 650; Sneed v. New York, 216 F(2) 169; O'Day v. Chicago, River, 216 F(2) 79; Burks v. Associated, 161 F(2) 305; Barron & Holtzoff, "Federal Practice & Procedure", Sec. 1081, page 80. Cf. Johnson v. New York, 344 U.S. 48; Byrd v. Blue Ridge, 355 U.S. 525.

JUDGMENT.

Extract from the Minutes of March 20, 1959.

J. A. MOORE and FARRIS ANTOINE,
No. 17483.

versus

MISSOURI PACIFIC RAILROAD COMPANY.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellee, Missouri Pacific Railroad Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

APPENDIX "B"

Section 1; Paragraph (7). FREE TRANSPORTATION FOR PASSENGERS PROHIBITED; EXCEPTIONS: PENALTIES.

No common carrier subject to the provisions of this chapter, shall, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees, its officers, time inspectors, surgeons, physicians, and attorneys at law, and the families of any of the foregoing; to the executive officers, general chairmen, and counsel of employees' organizations when such organizations are authorized and designated to represent employees in accordance with the provisions of the Railway Labor Act; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge; to necessary caretakers of livestock, poultry, milk, and fruit; to employees on sleeping cars, express cars, and to linesmen of telegraph and telephone companies; to railway mail-service employees and persons in charge of the mails when on duty and traveling to and from duty, and all duly accredited agents and officers of the Post Office Department and the Railway Mail Service and post-office inspectors while traveling on official busi-

ness, upon the exhibition of their credentials; to customs inspectors, and immigration officers; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons: Provided, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation: And Provided further, That this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employees, and their families of such telegraph, telephone, and cable lines, and the officers, agents, employees and their families of other common carriers subject to the provisions of this chapter: Provided further, That the term "employees" as used in this paragraph shall include furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed in the employment of a carrier and ex-employees traveling for the purpose of entering the service of any such common carrier; and the term "families" as used in this paragraph shall include the families of those persons named in this proviso, also the families of persons killed, and the widows during widowhood and minor children during minority of persons who died while in the service of any such common carrier. Any common carrier violating this provision shall be deemed guilty of a misdemeanor and for each offense, on conviction, shall pay to the United States a penalty of not less than $100 nor more then $2,000.

and any person, other than the persons excepted in this provision, who used any such interstate free ticket, free pass, or free transportation shall be subject to a like penalty. Jurisdiction of offenses under this provision shall be the same as that provided for offenses in sections 41-43 of this title. Feb. 4, 1887, c. 104, Pt. I, Sec. 1, 24 Stat. 379; June 29, 1906, c. 3591, Sec. 1, 34 Stat. 584; Apr. 13, 1908, c. 143, 35 Stat. 60; June 18, 1910, c. 309, Sec. 7, 36 Stat. 524; Feb. 28, 1920, c. 91, Sec. 401, 41 Stat. 475; Aug. 9, 1935, c. 498, Sec. 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, Sec. 3(a), (b), 54 Stat. 900; June 24, 1948, c. 622, 62 Stat. 602; June 27, 1952, c. 477, Title IV, Sec. 402(g), 66 Stat. 277.

APPENDIX "C"

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. 10,680

J. A. MOORE
-versus-
MISSOURI PACIFIC RAILROAD COMPANY

Civil Action No. 10,681

FARRIS ANTOINE
-versus-
MISSOURI PACIFIC RAILROAD COMPANY

J. A. Copeland, of Houston, Texas, for Plaintiffs Moore and Antoine.

Woodul, Arterbury & Wren (Howard S. Hoover) of Houston, Texas for Defendant Missouri Pacific Railroad Company

July 10, 1958

Memorandum:-

This is an action by two former employees of the defendant railroad company, who seek to recover damages for their alleged wrongful discharge. The employment of each plaintiff is under and in pursuance of a collective bargaining agreement between the employees' respective brotherhoods; Conductors as to the plaintiff Moore, and Brakemen as to the plaintiff Antoine. Under the contract with the Conductors, discipline by the railroad might not be administered to the employee "without just and

sufficient cause". Comparable language in the Brakemen's contract provides that such employees would not be disciplined or dealt with unjustly.

Sometime prior to the discharge of the two plaintiffs, railroad officials had reason to believe that passengers between Houston and New Orleans were being carried without the payment of fare, and that the railroad employees were accepting money or bribes from such persons, by reason of which they were permitted to ride without the purchase of a ticket. In order to make an investigation of this alleged practice, two individuals were employed as special investigators. They were not prior railroad employees, and hence were not known to the train crews. Such special employees were directed to make the effort to bribe or pay the conductor and/or the porter on the passenger trains between Houston and New Orleans and return, and thus to secure passage without the purchase of a ticket.

As a result of this investigation, and on the statement of the two investigators that the two plaintiffs here were guilty of this practice and had accepted money for this purpose, charges of improper conduct and violation of company rules were filed against them. A hearing was held in each instance, before a Board of company executives convened for that purpose, as provided in the union contracts. Each plaintiff was advised and represented by one of his union representatives, designated for that purpose. In each instance, the Board found the employee to be guilty of the practice mentioned, and ordered the discharge of each from the service.

At pre-trial conference, it was determined that the only issue of fact was whether the railroad officials in reaching the conclusion that each plaintiff was guilty, and

in ordering their discharge, had acted with "just and sufficient cause", or had "dealt unjustly" with the plaintiffs.

In each instance the Jury found for the plaintiffs, fixing damages at $17,000.00 and $9,000.00, respectively.

At the close of plaintiffs' testimony, and again at the close of the evidence, the defendant moved for a directed verdict. Ruling on each motion was reserved. I am convinced that the motions were well taken and should have been granted.

There was no evidence of probative value showing or tending to show that the railroad officials acted arbitrarily or capriciously in finding the plaintiffs were guilty of the matters charged, or that they were influenced by improper motives. There was considerable evidence tending to show the plaintiffs' guilt in the record of the hearing. The plaintiffs simply denied the charge, and denied ever having seen the special investigators.

The plaintiffs failed to sustain the burden to show that the action of the defendant was "without just and sufficient cause", or that the plaintiffs had been "dealt with unjustly".[1]

The motion to set aside the verdict and to enter judgment for the defendant notwithstanding the verdict is granted.

Clerk will notify counsel.

Done at Houston, Texas, the 10th day of July, 1958.

BEN C. CONNALLY
Judge

[1]See Buster v. Chicago, M., St.P. & P.R. Co. (7th Cir.), 197 F.(2d) 73.

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959

No. 235

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,
v.
J. A. MOORE and FARRIS ANTOINE, *Respondents*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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To: *The Honorable Supreme Court of the United States:*

Above named Respondents, by this Brief in Opposition, respectfully represent that Petitioner has not shown any good, valid or sufficient reasons why this Honorable Court should grant its Petition for Writ of Certiorari.

OPINION BELOW

Since the authorities cited in the footnotes of the Opinion of the Court of Appeals (R. 448), as printed in Appendix "A", on pages 33 to 39 of said Petition for Writ of Certiorari, are incorrectly printed in several instances both as to volume number and page number, we cite Your Honors to the Opinion of said Court of Appeals as reported in 264 F. 2d 754, where the authorities are correctly printed, and which also contains the Memorandum Opinion of the United States District Court in the consolidated cases at bar.

JURISDICTION

Although this Supreme Court has jurisdiction under 28 U.S.C. Sec. 1254, there are no genuine or meritorious motivating factors which require this Honorable Court to exercise its jurisdiction or to grant a Writ of Certiorari herein, and the reasons advanced by Petitioner for the granting of such Writ are deceptively specious, as we shall hereinafter demonstrate.

QUESTIONS PRESENTED

There actually is no Federal question involved in the two consolidated cases at bar. They were tried in the United States District Court, and jurisdiction was vested therein, solely on the ground of diversity of citizenship (R. 27, 30).

As stated in the Opinion of the Honorable Court of Appeals, these cases for damages for wrongful discharge of Respondents by Petitioner, from further employment under their respective contracts, were gov-

erned by general common law and by the law of Texas, as settled by the Supreme Court of Texas (the highest court of that State) in *Texas & New Orleans R. Co. v. McCombs*, 143 Tex. 257, 183 S.W. 2d 716, and by the United States Supreme Court in *Moore v. Illinois Cent. R Co.*, 312 U.S. 630, 61 S. Ct. 754, 85 L. Ed. 1089.

Ingenious counsel for Petitioner, by resorting to both state and federal cases which have been overruled and long since consigned to the "junk heap" as bad law; namely, the cases of *Matlock v. G. C. & S. F. R. Co.*, 99 S.W. 2d 1056 (Tex. Civ. App.) and *Buster v. Chicago, M. St. P. & P. R. Co.*, 195 F. 2d 73 (7th Cir. Ct. App.), have cleverly sought to have this Honorable Court abandon its previous holdings in the case of *Moore v. Illinois Cent. R. Co., supra*, and to assume the role of Congress by holding that the investigative Board (comprised *solely* of the Railroad's officials, as in the cases at bar), constitutes an "administrative agency" under the statutes of the United States, and to then further hold *as a matter of law* that the rulings of such investigative Board (discharging Respondents from their employment) were not subject to review by the Courts or jury where there was *any substantial evidence* to support such Board's rulings.

In plain, judicial righteousness, the real questions presented here are: Should this Honorable Court grant a Writ of Certiorari in these cases, to the end that such citizens be deprived of their inalienable and constitutional right of trial by jury in such common law actions by the means of unconstitutionally extending the so-called "substantial evidence rule" to such private Boards consisting of the Railroad's officers (who are, by the very nature of their

offices and allegiance, the "sole prosecutors, judges, jury and executioners" as to such employees' rights and remedies)? Correlatively, should this Honorable Court utterly relinquish to such private Board the jurisdiction of the Supreme Court and of other federal and state courts by the means of erroneously holding that such private Board is a federal administrative "agency" whose findings are conclusive if based on "substantial evidence", when neither Congress nor the Texas Legislature has so intended or empowered such private Board to substitute itself for the courts or jury under our system of jurisprudence, and especially when this Honorable Court, the 5th Court of Appeals, and the highest Appellate Courts of Texas, have held to the very contrary under the latest decisions hereinafter cited?

STATUTES INVOLVED

The statutory provision in 49 U.S.C., Sec. 1, paragraph (7), printed as Appendix "B" on pages 41-43 of Petition for Writ of Certiorari, is not involved in these two Civil Actions for damages for wrongful discharge of Respondents because, even if incidentally involved, it completely passed out of the picture when the United States District Court, on the Motion of the Government's attorneys, dismissed the criminal case and Indictment against Respondents in Criminal Case No. 12475, *United States of America v. Jasper A. Moore and Farris Aultoine* on March 9, 1955, prior to the Investigation Hearing held by the Railroad's officials on March 17, 1955 (R. 58-61; Plaintiffs' Exhibit No. 1, R. 322-325; Defendant's Exhibit No. 1, R. 346-347; Plaintiffs' Exhibits Nos. 4 and 5, R. 341-342). Actually, Petitioner has, for the first time on this appeal,

invoked such statute on page 2 of its Petition for Certiorari. The only statutes, directly involved, are the following:

(1) Railway Labor Act, 45 U.S.C. Sec. 153 (i), which provides that:

> "The disputes between an employee or group of employees and a carrier or carriers *growing out of grievances * * * rules*, or working conditions, * * * shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes *may* be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board (National Railroad Adjustment Board) with a full statement of the facts and all supporting data bearing upon the disputes."

(2) Administrative Procedure Act, 5 U.S.C. Sec. 1001 (a) which provides:

> "(a) 'Agency' means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than * * * the courts. * * * Nothing in this chapter shall be construed to repeal delegations of authority as provided by law. Except as to the requirements of section 1002 of this title (relating to publication of information, etc., except where secrecy in the public interest or any matter relating solely to the internal management of an agency are involved) *there shall be excluded from the operation of this chapter (1) agencies composed of representatives of organizations of the parties to the disputes determined by them* * * *".

STATEMENT

Respondents make this Statement, under Rule 40(3) Supreme Court Rules, deeming it necessary, in order to correct some inaccuracies, omissions, and misstatements on the part of Petitioner which may inadvertently lead this Honorable Court to the wrong conclusion. The Statement on pages 3 to 11, inclusive, of the Petition for Certiorari is devoted mainly to the alleged investigation proceedings and hearing by the Railroad Company's officials of the purported violation by Respondents of Rule "N" of Petitioner's Book of Rules (R. 32); which charges were based upon a written report, in the form of a letter, dated November 30, 1954, addressed to Mr. E. C. Sheffield, Petitioner's General Manager of its Texas-Louisiana Lines, signed by its specially-hired, highly-paid, so-called "reliable" two colored investigators, Nicholas Christopher Mann and George Norton. As to the *reliability*, or rather *credibility*, of these two colored investigators, Nicholas C. Mann, in response to questions by Petitioner's attorney on the trial, admitted that he had been arrested several times and had served terms in the penitentiary (R. 246-248) and his Police Record showed at least five arrests and convictions, including felony convictions of forgery, possession of forged seaman's certificate, and unlawfully wearing Navy uniform (R. 70-71; 199; 352); and at the time he signed the letter which brought about such investigation Hearing by the Railroad Company's officials, it was also brought to the attention of Petitioner's officers that the other colored investigator, George Norton, was under indictment for murder (R. 71; 358-359). In contrast, Respondent Moore was 65 years old at time of trial, a 32nd degree Mason, had a good reputation and a good record

with Petitioner, and had worked for Petitioner and its predecessor as a passenger trial flagman, freight conductor and passenger train conductor for over 40 years prior to his suspension on December 2, 1954 (R. 110-111; 72; 93). In further contrast, Respondent Antoine had worked for Petitioner as a trainman and passenger train porter for almost 12 years (excepting the time he spent in military service (R. 150-151), and Petitioner's General Manager, Mr. V. A. Gordon, admitted that Porter Antoine had a good record of service both prior to and after World War II (R. 72).

The following statements of Petitioner: "At the trial of the case testimony with reference to whether or not Respondents were actually guilty of the charges preferred against them was substantially the same as that recited above, which was brought out at the hearing", and: "At the trial of the case the Respondents presented no other or further evidence or testimony which would prove or tend to prove their innocence of the charges made against them", on pages 11 and 12 of the Petition for Certiorari, are such abstract absurdities as to make a mockery of the well-established rule of law that when ruling on Petitioner's Motions for a Directed Verdict (R. 190-193; 320) and when ruling on Petitioner's Motions for Judgment Notwithstanding the Jury Verdicts (R. 398-401; 402-405) it was the duty of the Trial Court to consider the testimony and evidence in the light most favorable to Respondents, and to disregard all of the testimony and evidence favorable to Petitioner, and to indulge every reasonable intendment deducible from the stipulations and evidence in favor of each Respondent, and to give Respondents the benefit of those portions of the testimony

and evidence, both direct and circumstantial, together with all reasonable inferences to be drawn therefrom, which tended to support Respondents' cases for damages for wrongful discharge, since the ordinary rules of evidence and procedure *at common law* should have been applied in that type of suits.[1] The absurdity of the above quoted statements from pages 11 and 12 of its said Petition is best illustrated by the fact that the transcript of the Railroad official's Hearing (Deft's Ex. No. 1, R. 346-375) consumed only 29 pages of Vol. II of the Record, whereas the Court Reporter's transcript of the testimony of the witnesses and documentary evidence on the trial in the District Court (not including Deft's Ex. No. 1) covered over 300 pages (R. 44 to 345, Volumes I and II). To carry its absurdities to the extreme, overzealous Counsel for Petitioner, on page 25 of its Petition, recklessly state that Respondents were charged by their employer with stealing from it, and that: "These two men were caught red-handed", and that since Petitioner's Board of officials were "of the opinion that the two employees were guilty of the charges" * * * "They constitute good cause for discharge"; and, after lamenting the fact that the jury did not choose to believe the testimony of either the two colored so-called "special investigators" or of Petitioner's officers or its other witnesses, and the fact that by its verdicts the jury found that these two Re-

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[1] **Swift & Co. v. Morgan & Sturdivant**, 211 F.2d 115, 116; 49 A.L.R. 2d 924 (5th C.A.);
Coleman v. Graybar Elec. Co., 195 F.2d 371 (5th C.A.);
Railway Express Agency v. Mallory, 168 F.2d 426 (5th C.A.) Cert. Den. 69 S.Ct. 18, 335 U.S. 824, 93 L.Ed. 378;
Phillips Pet. Corp. v. Gibson, et al, 77 S.Ct. 16, 352 U.S. 874, 1 L.Ed. 2d 77, vacating Judgment of 5th C.A., 232 F.2d 13, on Writ of Cert., for failure to apply local law of Texas.

spondents were wrongfully discharged, without good cause or reason. Petitioner then wails about the action of its officers in discharging these men, that: "it's damned if it does and it's damned if it doesn't" on page 27 of its Petition for Certiorari. The fact that Petitioner was condemned by the jury to pay these two long and faithful employees damages for their wrongful discharge was not the fault of either our jury system or of our state or federal laws. Petitioner's own damnation was caused by the fact that its officials did not exercise common ordinary prudence or diligence in hiring reasonable, reliable and credible men to investigate the alleged mishandling of cash fares on its trains, but, instead, its General Manager and its Special Officer hired the two colored men, Mann and Norton, who had criminal records, through the Sheriff's Office, to make such alleged investigation (R. 198-201; 211; 215-220; 63-67). The one whom Petitioner's officials principally relied on, in the criminal case which was later dismissed by the Government's attorneys, and in the Railroad's investigation hearing *which was held after the dismissal of the criminal case*, namely, Nicholas Christopher Mann, was a self-confessed professional "stool-pigeon", a forgerer, and whose cross-examination showed that he had committed perjury in connection with his testimony in the cases here involved (R. 250-265). The testimony of Petitioner's officials, Mr. Gordon and Mr. Dollar, (who were members of its private Board and who persisted in holding the farcical hearing after the federal Government had dismissed the criminal cases on its own Motion) that *such executive officers relied solely on the unsworn and unverified statements of those two specially hired colored investigators* in discharging Respondents (R. 70-72; 75-76; 92-95) *regardless of what Respondents*

had to say, was enough to convince the jury that Respondents had been unjustly dealt with and had been wrongfully discharged by Petitioner's officials. Although "marked money" had been purportedly used by the Petitioner in connection with its alleged investigation, its attorney, HOWARD S. HOOVER, Esquire, *admitted that no marked money was found on search of either of Respondents after their arrest, and that there was no "marked money" involved in either of Respondents' cases* (R. 224-228, Vol. II). Although "investigator" Mann testified that he had handed Porter Antoine three five-dollar bills and one one-dollar bill, wrapped up in a ball for transportation of him and the other "investigator" Norton from New Orleans to Houston (R. 243), Norton testified that he did not see Nicholas Mann hand Farris Antoine anything (R. 307), and *that he did not see Mann hand Porter Antoine any money*, and *that he, Norton, did not make a statement to that effect* when the statement was dictated to a lady at the Sheriff's office on November 30, 1954, *and that he, Norton, wouldn't know whether Mann had even given Porter Antoine anything* (R. 308-310). Further, Norton also positively testified that he did not see Porter Antoine give Conductor Moore any money on that trip (R. 311). Petitioner's star-witness, Nicholas Mann, even testified that he could not say, as a matter of fact, that Conductor Moore got any part of any money that Mann claims he gave to Porter Antoine; and that he did not see Mr. Moore receive any money from Porter Antoine; and that he, Mann, could not really say, and did not know, whether Mr. Moore had any knowledge at all about any alleged transfer or exchange of $16.00 between Mann and said Porter (R. 289-290).

These are but a few illustrations of what the Record truly reflects as to Petitioner's trumped-up charges against Respondents. In view of this, how can Honorable Counsel for Petitioner say, with a straight face, before this most dignified and honorable Court in the country, that "These two men were caught red-handed" stealing from their employer?

As briefly shown, there were so many contradictions, conflicts and discrepancies between the testimony and statements of Petitioner's two well-paid and specially hired colored investigators and the testimony and statements of its officers and other witnesses, largely brought out by Respondents' counsel, putting Petitioner's officials on the stand under the "adverse witness rule" and by such cross-examination of Petitioner's witnesses, as to shatter and destroy the credibility and "reliability" of Petitioner's witnesses, that it would render this Brief unduly prolonged if we were to recite each such contradiction, conflict and discrepancy, or even if we should attempt to point out the mass of evidence supporting Respondents' damage suit and the jury's verdicts in their favor. Suffice it to say that, after carefully considering the lengthy two-volume Record and full Briefs of both sides, our position has been found to be correct and just in the following words of the Honorable Fifth Circuit Court of Appeals, quoted from 264 F. 2d at page 757, to-wit: "* * * we find ourselves in full agreement with all of plaintiff's contentions * * * *that there was ample evidence to take the cases to the jury and to support the verdicts in plaintiffs' favor;* and that the judgment non obstante veredicto must, therefore, be reversed."

On the trial below, Petitioner stipulated with Respondents that, in both cases, no relief was sought by either Re-

spondent under the Second Count of their respective Complaints; which Pre-Trial Stipulations therefore limited Respondents' claims to suits for damages for wroungful discharge, as sought in the First Counts of their Complaints (R. 29; 32; 7-9; 14-17). Even though the Trial Court in its Charge to the Jury wrongly placed the burden of proof on Respondents, when the burden really rested on Petitioner to prove that the discharges of Respondents were for good cause or reason under the authorities cited by the Court of Appeals in 264 F. 2d at page 755, Petitioner cannot now urge that these two cases were not governed by the common law or by the Texas law (which follows the law as established by the United States Supreme Court in *Moore v. Illinois Cent. R. Co.*, 312 U.S. 630, 61 S. Ct. 754, 85 L. Ed. 1089), especially since Petitioner, itself, did not object or except to the Court's Charge, as a whole, or to any part thereof (R. 386), and when such Charge, considered as a whole, did charge the jury as to Respondents' right to recover damages for their wrongful discharge by Petitioner (R. 375-383; 388-391); and where the jury, by its General Verdicts (R. 391-392), found in favor of each Respondent for their respective damages resulting from such wrongful discharge from service; and where there was ample evidence to support such jury verdicts in favor of Respondents, as so found by the Court of Appeals, as aforesaid.

REASONS FOR NOT GRANTING WRIT

The reasons for denying Writ of Certiorari are five-fold in these two consolidated cases, in this:

(1) The Board of Railroad officials, holding the investigation hearing resulting in the discharge of Respondents; was not an administrative agency, under

either the Administrative Procedure Act or the Railway Labor Act, to whose decisions the so-called "substantial evidence rule" would apply.

(2) In such suits as Respondents' for damages for wrongful discharge, they were not required by the Railway Labor Act to seek adjustments of their controversy with either the private Board of Railroad's officials or the National Railroad Adjustment Board as a prerequisite to the filing of suits for damages for wrongful discharge.

(3) There is no such conflict of decisions (as contended by Petitioner) between the holding of the Fifth Circuit Court of Appeals in the cases at bar and the holdings of it and other Courts of Appeals or the Texas Courts in the cases cited on page 17 of the Petition for Writ of Certiorari.

(4) The decision of the Court of Appeals in the cases at bar is clearly correct both under Texas law and under Federal law.

(5) There is no important question of Federal law involved that has not already been settled by this Honorable Supreme Court.

ARGUMENT

The reasons for not granting the Petitioner's Writ are so interwoven and related that we shall not undertake to argue them separately, but will present them in the order mentioned, as a group.

The Pre-Trial Stipulation in each Respondents' cases: That "No relief on the part of plaintiff is here sought under the Second Count of his original complaint" (R. 29;

32); was, in effect, that no relief by either Respondent was sought under the administrative procedure sections of the Railway Labor Act, and had the effect of restricting Respondent's respective claims to common law actions for damages for wrongful discharge. Such stipulations, alone, should suffice as ground for denial of Writ of Certiorari on behalf of Petitioner.

Sec. 153, Title 45, U.S.C., of the Railway Labor Act, provides for an administrative agency known as the "National Railroad Adjustment Board". Such Act was originally enacted in 1926, ch. 347, Sec. 3, 44 Stat. 578, and was amended in 1934, ch. 691, Sec. 3, 48 Stat. 1189, which was long prior to the enactment of the Administrative Procedure Act in 1946, Ch. 324, Secs. 1 to 11, Stat. 243, 5 U.S.C., Secs. 1001-1011. By the very terms of Sec. 1001(a), 5 U.S.C., which is quoted above on page 5 of this Brief, the administrative procedures of the Railway Labor Act, above mentioned, are excluded under the following wording of such Section 1001(a) of the Administrative Procedure Act; "there shall be excluded from the operation of this chapter (1) agencies composed of representatives of organizations of the parties or of representatives of organizations of the parties to the disputes determined by them * * *".

It has been so judicially determined, especially in cases where railroad employees have elected to pursue their administrative remedies through the Railroad Adjustment Board, in the following cases: *Stranford v. Pennsylvania Railroad Co.*, 155 F. Supp. 680 (D.C. N.J.); and *Barnett v. Pennsylvania-Reading Seashore Lines*, 245 F. 2d 579 (3rd C.A.). In the case of *Stranford v. Pennsylvania Railroad Co.*, supra, the Court said:

> "Although Section 1009(a) of the Act affords a judicial review to parties aggrieved by agency action, Section 1001(a)(1) defines agency so as to exclude 'agencies composed of representatives of the parties or representatives of organizations of the parties to the dispute.' Therefore, since the Railroad Adjustment Board is composed of representatives of the parties as provided by Section 153 of Title 45, supra, it is excluded from the operation of the Administrative Procedure Act and a party aggrieved by this Board's decision cannot seek a review under this Act."

If it applied, at all (which it does not, as we shall hereinafter show) the administrative agency and procedure mentioned in Sec. 153, subparagraph (i), 45 U.S.C., of the Railway Labor Act, would, under the authorities above mentioned, take precedence over the provisions of the Administrative Procedure Act. In the cases at bar, however, Respondents did not choose to refer their claims against Petitioner to the National Railroad Adjustment Board, and were not required to do so, hence Petitioner's contention that these cases should be governed by the so-called "substantial evidence rule" absolutely has no merit. Likewise, its contention that Respondents were required to exhaust their administrative remedies by reason of such Sec. 153, subparagraph (i), 45 U.S.C., or under any agreement between Respondents' labor organizations and the Petitioner, is laid to rest by the decision of the United States Supreme Court in the case of *Moore v. Illinois Central R. Co.*, 312 U.S. 630, 61 S. Ct. 754, 85 L. Ed. 1089, wherein this honorable Court said:

> "But we find nothing in that Act which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or to

make an administrative finding a prerequisite to filing suit in court. In support of its contentions, the railroad points especially to Section 153(i), which, *as amended in 1934*, provides that disputes growing out of grievances or out of the interpretation or application of agreements 'shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes MAY be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.' And in connection with this statutory language the railroad also directs our attention to a provision in the agreement between the Trainmen and the railroad—a provision authorizing Moore to submit his complaint to officials of the railroad, offer witnesses before them, appeal to higher officers of the company in case the decision should be unsatisfactory, and obtain reinstatement and pay for time lost if officials of the railroad should find that his suspension or dismissal was *unjust*. It is to be noted that the section pointed out, Sec. 153 (i), *as amended in 1934, provides no more than disputes 'MAY be referred* * * * to the * * * Adjustment Board. * * *' It is *significant* that the comparable section of the 1926 Railway Labor Act (44 Stat. 577, 578), had, *before the 1934 amendment*, provided that upon failure of the parties to reach an adjustment a *'dispute shall* be referred to the designated adjustment board by the parties, or by either party * * *." Section 3(c). *This difference in language, substituting 'MAY' for 'shall', was not*, we think, *an indication of a change in policy, but was instead a clarification of the law's original purpose.* For neither the original 1926 Act, nor the Act as amended in 1934, indicates that the machinery provided for settling disputes was based on a philosophy of legal compulsion.

> On the contrary, the legislative history of the Railway Labor Act shows a consistent purpose on the part of Congress to establish and maintain a system for peaceful adjustment and mediation voluntary in its nature. The District Court and the Circuit Court of Appeals *properly decided that petitioner was not required by Railway Labor Act to seek adjustment of his controversy with the railroad as a prerequisite to suit for a wrongful discharge.*" (Emphasis ours)

This landmark case was followed explicitly by the Supreme Court of Texas in the case of *Texas & New Orleans R. Co. v. McCombs*, 143 Tex. 257, 183 S.W. 2d 716, 719, where, after quoting the above excerpt from the *Moore v. Illinois Central* case, the highest Court of Texas said:

> "The opinion of the Supreme Court, as above quoted, gives the substance of the collective agreement and immediately continues its discussion of the meaning and policy of 45 U.S.C.A. section 153 (i), the Railway Labor Act, evidently treating the agreement as being in furtherance of that Act *and not intended to require the employee to seek adjustment of his controversy with the RAILROAD OFFICIALS as a prerequisite to suit when the Act itself does not require him to do so.*"

And, after applying the decision of the United States Supreme Court, above quoted, the Texas Supreme Court said:

> "* * * and that court expressly held that *the agreement did not make the railroad officers the sole or the final judges of the justice of the cause for discharge of the employee, and that appeal to the highest operating officer for reinstatement was not made a prerequisite to an appeal to the court for damages*," and, as said in the lower

appellate Court, "*there is nothing in the agreement* (same as in Appellants' agreements) *that requires the employee to seek administrative relief as a condition precedent to his suit in court for wages alleged to have been earned.*"

The latest Texas case, construing favorably to Respondents the provisions of such Sec. 153(i) of the Railway Labor Act, is *Atkinson v. Thompson*, 311 S.W. 2d 250 (Tex. Civ. App., at Houston) which was approved by the Texas Supreme Court by refusing to grant a Writ of Error, there being No Reversible Error committed by the Appellate Court.

On pages 16 and 17 of the Petition for Certiorari, Petitioner erroneously asserts that the decision of the Court of Appeals in the instant cases is contrary to the holding of the Court of Appeals for the 7th Circuit in the case of *Buster v. Chicago, M. & St. P. & P. R.*, 195 F. 2d 73; and to the prior holding of the 5th Circuit Court of Appeals in the case of *Thompson v. Moore*, 223 F. 2d 91, and to the declaration of Texas Law in the case of *Matlock v. G. C. & S. F. Railroad Co.*, 99 S.W. 2d 1056. (writ dism.). The *Buster* case, by the 7th Court of Appeals, is not authority for the application of the so-called "substantial evidence rule", since it affirmed the action of the Trial Court in setting aside the jury's verdict as being "*contrary to the overwhelming preponderance of the evidence*", and on the further ground that the *undisputed evidence* showed that Buster had violated a company rule in that he was fighting on the company's premises, which fact he could not and did not deny on the trial of the case; and furthermore, in the Record on appeal, the *undisputed evidence* showed that Buster had suffered *no loss*

whatsoever from a financial standpoint by reason of his discharge by the railroad officials, because he actually received in wages from other employers, from the time of his discharge to the date of trial, *more money* than the jury awarded him by its verdict as damages for claimed wrongful discharge. In view of such *undisputed evidence and state of the record*, the 7th Circuit Court said: "* * * *Although we do not approve of the course which that court* (trial court) followed in arriving at its conclusion, it did reach the right conclusion", in entering judgment for the railroad, dismissing Buster's Action. Under such *undisputed evidence*, the 7th Circuit Court of Appeals could not do otherwise than affirm the lower Court's judgment in favor of the railroad for the simple reason that Appellant had not sustained any damages. Anything further, that such 7th Circuit Court had to say about there being "no substantial evidence in this record which would justify a finding that plaintiff did not have a fair and impartial hearing in September, 1947, on the charge that he had violated company rules" (as quoted by Petitioner on pages 17-18 of its Petition), is pure surplusage, injected by Petitioner apparently to confuse Your Honors, as it did in the Trial Court on its motion for judgment n.o.v.

It is significant to here mention that the *Buster* case has never been followed by later decisions of the 7th Circuit Court of Appeals or by any other Court of Appeals; and, that, in reversing both the 7th Court of Appeals and the trial court where judgment n.o.v. had been rendered for defendant, the United States Supreme Court in *Tennant v. Peoria & Pekin U. R. Co.*, 321 U.S. 29, 64 S. Ct. 409, 88 L. Ed. 520, very aptly said:

> *"Courts are not free to reweigh the evidence and set aside the jury verdict merely* because the jury could have drawn different inferences or conclusions or *because judges feel that other results are more reasonable.*
>
> "Upon an examination of the record we cannot say that the inference drawn by this jury that respondent's negligence caused the fatal accident is without support in the evidence. *Thus to enter a judgment for respondent notwithstanding the verdict is to deprive petitioner of the right to a jury trial."*

The decision by the 5th Court of Appeals in the case of *Thompson v. Moore*, 223 F. 2d 91, is neither contra to that Court's decision in the cases at bar, nor does the case of *Matlock v. G. C. & S. F. Railroad Co.*, 99 S.W. 2d 1056, correctly declare the present Texas Law, in these type of cases, as contended by Petitioner. Had learned counsel for Petitioner merely taken the time to read the Trial Court's decision in *Moore v. Thompson*, 131 F. Supp. 665, by the late distinguished Judge Allred (whose decision was affirmed by the 5th Court of Appeals in 223 F. 2d 91) they would readily have seen that the very same contention they are urging in the instant cases was held to be futile, and that the decision in the *Matlock* case (Tex. Civ. App.), which was decided in 1936, has later been expressly overruled by the Texas Supreme Court in the case of *Texas & N. O. R. Co. v. McCombs*, 143 Tex. 257, 183 S.W. 2d 716, and again in the recent case of *Atkinson v. Thompson*, 311 S.W. 2d 350 (Error Ref. N.R.E.).

The decision of the late Judge Allred in the *Moore* case, and the affirmance thereof by the 5th Court of Appeals in 223 F. 2d 91, are both soundly upon the decisions of

the United States Supreme Court in *Moore v. Illinois Central R. Co.*, supra, and of the Texas Supreme Court in *Texas & N. O. R. Co. v. McCombs*, supra; and to illustrate, we quote from the opinion of the learned Judge Allred, in 134 F. Supp. 665, 666:

> "It is true that the Texas Supreme Court decided the McCombs case in the light of the Moore case and 'for the sake of uniformity of decision'; and stated that it 'should follow the Moore case rather than the decisions of the courts of civil appeals'. The Texas Supreme Court expressly refers to *Wyatt v. Kansas City Sb. R. Co.*, supra, and 'similar decisions,' (including *Matlock v. Gulf, C. & S. F. R. Co.*, Tex. Civ. App., 99 S.W. 2d 1056, *which the Supreme Court expressly overruled*).
>
> "Regardless of the basis of the McCombs decision, it remains the local law, announced by the highest court in this State in Railroad employee cases. The employment agreement in the McCombs case contained stronger language and more specific details as to procedure for seeking relief than the one here involved. The Texas Supreme Court held that while the McCombs agreement gave him the right to appeal to the highest company officials, it did not require him to do so; *and that there was nothing in that agreement that required the employee to seek administrative relief as a condition precedent to court action.* While that case dealt with a claim for overtime, there is no distinction in principle from a like provision dealing with unlawful discharge."

The contracts of the conductors in that *Moore* case and the present *Moore* case are almost identical. We, therefore, respectfully say that the decision of the 5th Circuit Court of Appeals, in the cases at bar, is clearly and eminently

correct, both under the present Texas Law and under prior decisions of such 5th Court of Appeals and of this Honorable Supreme Court.

As this Honorable Supreme Court and the 5th Circuit Court of Appeals have so clearly pointed out that the cases at bar are governed by the present Texas Law, and that Respondents' claims for damages for wrongful discharge by Petitioner, under the election of remedies so chosen by Respondents come within the rules of general common law, and that they were not required thereby to either resort to or exhaust the remedial procedures and remedies provided by their contracts of employment with Petitioner or by the provisions of Sec. 153, (i), 45 U.S.C., of the Railway Labor Act, it axiomatically follows that there is no important question of Federal law involved in the instant cases that has not already been settled by this Honorable Supreme Court. The remote and far-fetched probability that either the Petitioner or its officials *might* become subject to the penalties of Sec. 1, Para. 7, 49 U.S.C. (if it could possibly ever be proven on a Criminal Indictment that Respondents were guilty of permitting Petitioner's "special investigators" Mann and Norton, to have free transportation from New Orleans to Houston on Nov. 29, 1954) does not make it an important federal question for review by this Honorable Court, for the simple reason that the Criminal Indictment No. 12475 against Respondents (R. 322-325) was dismissed on the Government's own motion, and that Respondents have never been re-indicted nor further criminally prosecuted for such alleged offense, or any similar offense, involving such alleged transportation of said Petitioner's specially-hired employees.

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that the Petition for a Writ of Certiorari should be denied; and only in the event this Court grants such a Writ on the primary Petition of the Railroad Company, then only in such event, Respondents as Cross-Petitioners pray that such a Writ issue solely for the purposes of applying the local law of Texas by directing the Clerk to perform the ministerial acts of entry of judgments for Respondents on the General Verdicts of the jury in their favor, as of the date of May 15, 1958, by virtue of Rule 58 F.R.P., on such Reversal by said Court of Appeals of the judgments non obstante veredicto entered by the Trial Court, since Petitioner did not comply with Rule 50 (b) F.R.P., by joining a Motion for New Trial with its Motion for judgment n. o. v., or by praying for a New Trial in the alternative to such Motion n.o.v., while the Trial Court still had jurisdiction. Since the facts were fully developed on the trial and "there was ample evidence to take the cases to the jury and to support the verdicts in plaintiffs' favor", and since these cases are governed by Texas law, as stated in the Opinion of the Court of Appeals, we respectfully suggest that Rule 50 (b) of the Federal Rules of Procedure should be by this Honorable Supreme Court construed in the light of Rule 434, Texas Rules of Civil Procedure, adopted by the Supreme Court of Texas; the pertinent part of which provides that: "When the judgment or decree of the court below shall be reversed, the (appellate) court shall proceed to render such judgment or decree as the court below should have rendered". The action of Petitioner, in causing the Trial Judge to erron-

cously render such judgments in Petitioner's favor notwithstanding the verdict of the jury, has resulted in the present confused state of the non-final judgment of the Court of Appeals which has directed that these cases be "remanded to afford the district judge the opportunity to determine whether judgments should be entered on the verdicts or whether a new trial should be granted"; and well-planned action on the part of Petitioner was calculated to, and did cause, and still causes, Respondents to be deprived of their rights of trial by jury and of the valuable and non-replacable jury verdicts in their cases; which rights the writers of our United States Constitution had intended to guarantee to Respondents by the 7th Amendment thereto. Under such circumstances, we feel that it is the duty of the Supreme Court to direct the clerk or the court below to so enter the judgments for Respondents on such General Verdicts of the jury. Otherwise, such constitutional guaranties and the provisions of Rule 58 F.R.P., as to the clerk's ministerial acts and duty of entry of judgments on General Verdicts (which this Court evidently promulgated to speed justice) are frivolous and meaningless.

Since the Honorable Trial Court has, in more ways than one as shown by the Record, violated the constitutional rights and guaranties of Respondents, both against unlawful deprivation of their property rights and their rights of trial by jury, may we sincerely ask: What guarantee do Respondents have that, upon such remand of these cases to the same Trial Judge, they will not be further judicially ravished?

Under the teachings to lawyers and jurists, from time immemorial, it has been the ideology that the courts

(including this Honorable Court) should, without violating such constitutional guaranties either as to property, personal or jury rights, bring about the earliest possible termination of litigation. We thus believe that the Supreme Court intended, by promulgating Rule 50(b) F.R.P., that where a party invokes this new jurisdiction which the Trial Court not have at common law) by a Motion for Judgment n.o.v., without at the same time either joining such Motion n.o.v., a Motion for a New Trial, or praying for a new trial in the alternative to such Motion n.o.v., as provided by Rule 50(b), such moving party thus waives his right to file a Motion for New Trial, many years and terms later under Rule 59(a) F.R.P., after having gambled on a Motion for Judgment n.o.v., under Rule 50(b).

Otherwise, after an appeal by the party against whom the Judgment is rendered notwithstanding the jury-verdict in his favor, on a reversal and remand, with the privilege extended to the same Trial Court, at his own discretion, to grant a new trial, litigants are again, as in the trial of these cases at bar, subjected to the same whims and caprices of the Trial Judge as they were in the beginning, except that, as a matter of practice, they are actually at a greater disadvantage. You, as honorable men, already know the answer to our plight. The simple solution is for Your Honors to hold that, by reason of Petitioner's election to file such Motion for Judgment n.o.v., under Rule 50(b), without either joining therein a Motion for New Trial or praying in the alternative for a New Trial, it wholly waived its right to ask for a New Trial after expiration of many years and terms of Court, where no motion has ever been filed for a New Trial, because

the very wording of that sentence in Rule 50(b) that "A motion for a new trial may be joined with this motion (n.o.v.) or a new trial may be prayed in the alternative" means that Petitioner should, without delay and during term-time, choose between relying on the provisions of Rule 50(b), or of Rule 59(a), and that if Petitioner elects to rely on Rule 50(b), as in the cases at bar, it is limited to the relief provided by Rule 50, both as to (a) and (b) thereof.

Otherwise, the interminable litigation and heavy burden of costs imposed upon Respondents by such an Order of an Appellate Court that these cases be remanded to the District Court to afford it the "*opportunity*" to *choose* whether judgment should be entered on the verdicts or whether a new trial should be granted, leaves the matter again within the *sole discretion* of the same Trial Judge, who was reversed for doing what he should not have done for Petitioner in the first place. This travesty on justice cannot be rectified by the hands of God, alone, but with His guidance a clarifying stroke of the pen by the Honorable Members of this Court would be of great help, lest Respondents and their attorneys die of old age before final termination of this long-drawn-out litigation.

In the event such Writ is granted, Respondents respectfully request that judgment be here rendered in their favor, or in its Mandate this Court direct the Clerk to perform his ministerial act, under Rule 58 F.R.P., of entering judgments on the General Verdicts in favor of each Respondent for the amounts awarded them, respectively (R. 391-392), together with interest at the

rate of 6% per annum from May 15, 1958, and that all costs in all Courts be taxed against Petitioner.

Most respectfully submitted,

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Certificate of Service

Copies of the foregoing Brief For Respondents have been served upon Mr. Howard S. Hoover, Messrs. Arterbury, Hoover & Graham, and Messrs. Hutcheson, Taliaferro & Hutcheson, attorneys and counsel for Petitioner, by depositing the same in the United States post office at Houston, with first class postage prepaid, properly addressed to said counsel for Petitioner at their respective post office addresses.

Maurice M. Davis

Attorney for Respondents